

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHN B. MARDESICH,

Petitioner,

vs.

ALICE PAYNE,

Respondent.

NO. CV-05-5098-LRS

ORDER DISMISSING PETITION WITHOUT
PREJUDICE

BEFORE THE COURT is Petitioner's motion to dismiss his habeas corpus petition. (Ct. Rec. 33). The state has no objection to Petitioner dismissing his petition. (Ct. Rec. 36).

Petitioner must be mindful of the one year period of limitations set forth in 28 U.S.C. § 2244(d). Failure to timely file a federal habeas petition would be cause for dismissal. Petitioner is advised the one year limitations period is not statutorily tolled during the pendency of a federal habeas petition, *see Duncan v. Walker*, 533 U.S. 167 (2001), and has continued to run while the present petition has been before this court.

While the court will grant Mr. Mardesich's request for voluntary dismissal without prejudice under Fed. R. Civ. P. 41(a)(1), it is with the caution that such dismissal may effectively be "with" prejudice if Mr. Mardesich's claims were indeed time-barred when he submitted this

1 petition unless Petitioner could establish that at the time of
2 dismissal he was entitled to equitable tolling. *See Ford v. Hubbard*,
3 330 F.3d 1086, 1101 (9th Cir. 2003) vacated by the Supreme Court. See
4 *Pliler v. Ford*, 542 U.S. 225, 124 S.Ct. 2441, 2446, 159 L.Ed.2d 338
5 (2004) (holding that "district judges are not required to give pro se
6 litigants" the warnings prescribed in the Ninth Circuit's decision).

7 Accordingly, **IT IS ORDERED:**

8 1. Petitioner's Motion to Dismiss his Petition (Ct. Rec. 33) is
9 **GRANTED**. The Petition is dismissed WITHOUT PREJUDICE.

10 **IT IS SO ORDERED.** The District Court Executive is directed to
11 CLOSE THE FILE, enter this order and forward copies to Petitioner and
12 counsel.

13 **DATED** this 25th day of August, 2006.

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15 ***s/Lonny R. Suko***

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17 LONNY R. SUKO
18 UNITED STATES DISTRICT JUDGE
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